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Supreme Court of the United States

OCTOBER TERM, 1959

No. 481

LEO O. JOHNSON, AN INDIVIDUAL DOING BUSINESS AS JOHNSON HAIR AND SCALP CLINIC,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JAMES I. McCAIN,
818 Whitney Building,
New Orleans, Louisiana,
Counsel for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

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Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

LEO O. JOHNSON, AN INDIVIDUAL DOING BUSINESS AS JOHNSON HAIR AND SCALP CLINIC,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on May 21, 1959, affirming an order of the Federal Trade Commission of June 10, 1958 directing petitioner to cease and desist certain newspaper advertising relative to his business.

OPINIONS BELOW

The "Final order" and "Opinion" of the Federal Trade Commission appears at pages 70-79 of the Transcript of Record and at the same pages in the nine addi-

tional copies of the record printed for the Court below and filed with this petition under Rule 21 (4), Supreme Court Rules. The opinion of the United States Court of Appeals for the Fifth Circuit appears at pages 81-82 of the Transcript of Record and in Appendix A, page 13, and is officially reported in 266 F. 2d 560.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered and entered on May 21, 1959. Appendix A, page 13; R. 81-82.

Application for rehearing was denied on July 21, 1959. Appendix A, page 14; R. 99.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the Federal Trade Commission constitutionally assume jurisdiction under Title 15, United States Code, Section 52 (a) (1) of the one-shop, intrastate, local-service clinic because a small portion of the clinic's newspaper advertisements for local trade are delivered by the newspaper company through the United States mails or beyond State lines, such means or places of delivery being selected by the newspaper company to serve its interests.

2. Can said Section 52 (a) (1) of the Federal Trade Commission Act be interpreted to give the Commission jurisdiction to regulate the one-shop, intrastate, local-service clinic because a small portion of the clinic's advertisements in the local newspaper for local trade are disseminated by the newspaper company to facilitate the Company's business by means of the United States mails or beyond State lines **on the theory that the advertiser does "cause" that particular dessemination.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Commerce Clause:

> "Congress shall have power * * * To regulate Commerce with foreign nations, and among the several States and with the Indian Tribes;" (excerpt)

United States Constitution, Article I, Section 8, Clause 3.

The statutory provisions involved are Sections 12 and 14(a) of the Federal Trade Commission Act, Title 15, United States Code, Sections 52 and 54(a) (Printed in Appendix B pages 25-26) and Louisiana Revised Statutes, Title 51, Section 411 (Printed in Appendix B, page 27).

STATEMENT OF THE CASE

On January 18, 1956 The Federal Trade Commission issued its complaint against petitioner and others alleging that petitioner, in collaboration with others in the operation of their five scalp clinics in different cities of the United States, dispensed certain cosmetics to the public, (Complaint, R. 15-24; same pages in nine additional copies); that said operators and owners falsely advertised the efficacy of their services using these cosmetics and "disseminated and caused the dissemination of advertisements concerning their said preparations by the United States mails and by various other means in commerce." It was further alleged that such advertisements mislead the purchasing public to its injury and, being deceptive practices in commerce, petitioner, with others, were directed to show cause why a cease and desist order should not issue against such advertising.

On February 27, 1956 petitioner (who alone contested this proceeding) filed answer in which he set out (among other defenses) that at the time of filing of the complaint he was not in business with the other named respondents; that he was operating only one clinic in New Orleans, Louisiana, solely on an intrastate basis and was therefore not subject to the jurisdiction of the Federal Trade Commission (Answer, R. 29-33; same pages in nine additional copies). Petitioner also pleaded that he was not disseminating or causing to be disseminated any advertisements in commerce by any means.

The testimony pertinent to this jurisdictional issue and taken before the Hearing Examiner, is found in Appendix B of the certified record, pages 1 to 176 and on the same numbered Appendix B pages of the nine additional copies of testimony filed herein which were appended to petitioner's brief in the Court below.

The undisputed facts show that at the time of the filing of the complaint and since then the petitioner has had but one clinic, located at 819 Richards Building, in New Orleans, Louinsiana, (Record Appendix B, 25, 162, 167). He was the sole owner and his entire working force consisted of four people, himself, a secretary and two beauticians, licensed by the Board of Cosmetology of the State of Louisiana. He had no salesmen. The method and quality of his advertising was regulated (and penalized, if necessary) under the Louisiana false advertisement statute i.e. Louisiana Revised Statutes, Title 51, Section 411, (Appendix B, page 27). All services, sales and deliveries of said business were completed at 819 Richards Building, New Orleans, (Record Appendix B, 167). Petitioner made no deliveries by mail and induced no sales across state lines. Petitioner advertised through local newspapers of the Times-Picayune Publishing Com-

pany, i.e. The Times-Picayune (morning paper) and the Daily States (afternoon paper). These were published jointly on Sunday, (Record Appendix B. 25-27). This was his only medium of advertising. He advertised only in the local newspapers for local trade to be supplied locally, (Record Appendix B. 165).

A minute portion of the newspapers containing petitioner's advertisements were placed in the United States mails by the Times-Picayune Publishing Company for delivery to its customers. A small portion of the same newspapers were delivered into other states, primarily, Mississippi, by bus and other transportation facilities, (Record Appendix B. 63-71). The selection of the United States mails as a medium of delivery of the newspapers and the delivery of same outside the State of Louisiana was a matter in the sole control of the publisher to meet the needs of the publisher's customers. The advertiser had no control, interest or voice in the selection of the means or places of delivery of the newspapers, (Record Appendix B. 77-79).

On November 29, 1957 the Hearing Examiner of the Federal Trade Commission made and filed his Initial Decision with appended cease and desist order restraining the specified advertising, (R. 51-66; same pages in nine additional copies of transcript of record for Court below). The Trial Examiner found that petitioner was operating only the New Orleans Clinic, (R. 58) but in answering petitioner's intrastate plea on jurisdiction, held that petitioner's business was subject to regulation by the Federal Trade Commission because some of his advertisements in the New Orleans newspapers were delivered through the mails or into adjoining States by the newspaper publishing company, (R. 58).

On appeal the Federal Trade Commission, in its Final Order and Opinion, adopted and affirmed, with slight modifications, the opinion and order of the Trial Examiner, (R. 70-79; same pages in nine additional copies of record in Court below). The Commission held that petitioner's business was subject to its jurisdiction under Section 12 (a)(1) (15 U.S.C. 52 (a)(1)) of the Trade Commission Act, as some of petitioner's advertisements were disseminated through the United States mails and into other States by the newspaper delivery system; that thereby petitioner did "cause" the dissemination of advertisements by United States mail and in commerce.

Under the provisions of the Trade Commission Act, Section 5 (c), Title 15, United States Code, Section 45 (c), petitioner sought review of the Federal Trade Commission Opinion and Order in the United States Court of Appeals for the Fifth Circuit. On May 21, 1959 this Court (by a divided Court), affirmed the order of the Commission and stated briefly that this case was governed by its recent decision in *Mueller v. United States*, 262 F. 2d 443. The opinion in the present case is found in the record at pages 81 and 82 and Appendix A, page 13. The *Mueller* decision is found in Appendix A, pages 16-24.

On July 21, 1959 the Court of Appeals denied petitioner's application for a rehearing by a divided Court, (R. 99, Appendix A, page 14). The Court gave no answer to petitioner's contention (as set out in the petition for rehearing with brief, (R. 85-98)) that the Federal Trade Commission could not constitutionally assume jurisdiction over a purely intrastate business and that petitioner did not disseminate advertisement in commerce by placing such advertisements in a local newspaper for local trade.

REASONS FOR GRANTING THE WRIT

Question 1.

It is apparent from the undisputed facts that petitioner's business represents the most basic unit of intrastate commerce.

If the Federal Trade Commission has jurisdiction over petitioner's one-shop, local-trade business then it has jurisdiction over every independent, single grocery store, drug store, barber shop, etc. located in the United States, which sells cosmetics and which advertises its wares in a local paper for local trade, if some of the newspapers are delivered by the publisher in an adjoining state or by the United States mails.

In adopting the amendment to the Trade Commission Act in 1938 (Section 12) Congress was aware of the myriad number of local shops whose local newspaper advertisements crossed state lines in pursuit of the publisher's business and Congress did not intend to grant the Trade Commission unlimited jurisdiction as sought in this case. Congress could not constitutionally grant such jurisdiction under the Commerce Clause.

This issue involves an interpretation of Section 12 (a) (1) the Trade Commission Act (15 U.S.C. 52 (a) (1)) which has not been passed on by this Court and should be resolved by this Honorable Court as such is necessary to a proper administration of this federal statute. This is particularly urgent in view of the fact, that, if this statute can be extended as contended by the Commission, its enforcement will overlap and conflict with the enforcement of various State false advertisement statutes governing intrastate advertising. (Louisiana Statute, Appendix B, page 27).

In addition, this decision is contrary to the decisions of this Court which recognize that the "Commerce" power of Congress cannot be constitutionally extended so as to destroy the true distinction between intrastate and interstate commerce; that it cannot be extended to encompass local businesses unless they **actually** affect interstate trade.

National Labor Relations Board vs. Jones and Laughlin Steel Corporation, 301 U.S. 1:

> "Undoubtedly, the **scope** of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. * * *
>
> The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, **which the commerce clause itself establishes,** between commerce among the several states and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Carter vs. Carter Coal Co., 298 U.S. 238:

> "Since the validity of the act depends upon whether it is a regulation of interstate commerce, the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question in this branch of the case. The commerce clause (Art. 1, Section 8, c. 13) vests in Congress the power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' The function to be exercised is that of regulation. The

> thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation."

In *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495:

> "In determining **how far** the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * * But when the effect of intrastate commerce is merely indirect, such transactions remain within the domain of the state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufference of the federal government."

The Federal Trade Commission is a body of limited authority and exercises only administrative functions, *Federal Trade Commission vs. Eastman Kodak Co., et al*, 274 U.S. 619. The exercise of its power is necessarily circumscribed by the limits of the commerce clause. The publisher's business may affect "commerce" but such does not encompass the local shop advertiser. Petitioner's business does not affect or "touch" commerce anymore than the homeowner who offers his property for sale and whose newspaper advertisement may be delivered in an adjoining state to the newspaper's customer.

The Mueller Case

The majority, *per curiam* opinion herein in holding that this cause is controlled by *Mueller vs. United States*, 5th Cir. 1958, 262 F. 2d 443, overlooks the basic **legal** distinction set out herein i.e. that petitioner's purely intrastate business cannot be constitutionally regulated by the Trade Commission. This issue was not raised by Mueller.

Herein, when the Commission sought to take jurisdiction, petitioner's business was the one unit shop. From a factual distinction, as shown by the *Mueller* decision, Mueller was maintaining clinics in four Texas cities and advertised in five large Texas daily papers. His advertisements solicited out-of-town customers and suggested that reports on home treatment could be forwarded by United States mail.

Question 2.

The Federal Trade Commission assumed jurisdiction under Title 15, United States Code, Section 52 (a) (1):

> (a) It shall be **unlawful** for any person * * * to * * * **cause** to be **disseminated** any false advertisement—(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics.

Petitioner did not "cause" the dissemination, as such is meant in the statute, as the record conclusively shows that the selection of the United States mails as a means of distinction or out-of-state distribution, was the independent act of the publisher. (Record Appendix B, pages 77-79, 88). Such selection was entirely determined by the interests of the publisher's business. The local

advertiser could not affect, control or prevent such selection by publisher, (Record Appendix B, pages 77-79, 88).

Congress did not intend to include within Section 52 (a) (1) the single, local advertiser, inasmuch as the "**causing** of **dissemination** of a false advertisement under Section 52 (a) (1) is made a Federal crime under Section 14 (a) of the Act, Title 15, United States Code, Section 54 (a). Appendix B, page 26.

If jurisdiction exists **herein** because of the **causing** of **dissemination,** then the advertisement of the local trader would become a crime when the publisher by his independent act selected the mails as a means of distribution or made out of state deliveries.

If the independent act of the publisher creates jurisdiction, it similarly completes the crime of the advertiser. Obviously, Congress never intended to create jurisdiction or define a crime as to the present facts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES I. McCAIN,
818 Whitney Building,
New Orleans, Louisiana,
Counsel for Petitioner.

APPENDIX "A"

Original Judgment of

The

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17411

LEO O. JOHNSON, an individual doing business as JOHNSON HAIR AND SCALP CLINIC,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Trade Commission.

(May 21, 1959.)

Before RIVES, CAMERON and JONES, Circuit Judges.

PER CURIAM: We find no such difference in fact as distinguished this case from *Mueller v. United States*, 5th Cir. 1958, 262 F. 2d 443. We adhere to the doctrines there announced. The order of the Commission is affirmed and will be enforced.

AFFIRMED.

CAMERON, Circuit Judge, dissenting.

APPENDIX "A"

Order Denying Rehearing

Extract from the Minutes of July 21, 1959.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17411

LEO O. JOHNSON, an individual doing business as JOHNSON HAIR AND SCALP CLINIC

versus

FEDERAL TRADE COMMISSION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Cameron, Circuit Judge, dissenting."

APPENDIX "A"

Judgment and Affirming Order

Extract from the Minutes of August 3, 1959.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17411

LEO O. JOHNSON, an individual doing business as JOHNSON HAIR AND SCALP CLINIC

versus

FEDERAL TRADE COMMISSION

This cause came on to be heard on the petition of Leo O. Johnson, an individual doing business as Johnson Hair and Scalp Clinic for review of an Order of the Federal Trade Commission issued on June 10, 1958, in Docket No. 6497, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Order of the Federal Trade Commission in this cause be, and the same is hereby, affirmed; and that said Leo O. Johnson, an individual doing business as Johnson Hair and Scalp Clinic, abide by and perform the directions of the Commission in said order contained;

The Order of the Commission shall become final and this judgment shall become effective as provided by Title 15 U.S.C.A. Section 45(g).

"Cameron, Circuit Judge, dissenting."

APPENDIX "A"

Judgment and Decree

By The

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In

No. 17293

SIDNEY J. MUELLER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(December 23, 1958.)

Before TUTTLE, JONES, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: Sidney J. Mueller appeals from a judgment in favor of the United States in an action by the United States to recover penalties for Mueller's violation of a cease and desist order of the Federal Trade Commission.[1] We affirm.

---

[1] The action is authorized by Sections 5(1) and 16 of the Federal Trade Commission Act. 15 USCA 45(1), 46.

Sidney J. Mueller, Hair Expert,[2] had a sure-fire recipe for a profitable business. He could make hair grow where before there was only fuzz. He could thicken hair, rejuvenate the growth function of hair, and banish baldness. He could energize the scalp. He could kill bacteria beneath the scalp. He could eliminate forever one's dandruff, itchy scalp, dry scalp and oily scalp. Or so he represented. And so he advertised. Unfortunately for Mr. Mueller, in 1952 the Federal Trade Commission ordered him to cease and desist from "disseminating or causing to be disseminated by means of the United States mails or by any means in commerce" any advertisement containing such representations.[3]

---

[2] Mueller carried on his business under the name "Mueller Hair Experts".

[3] The cease and desist order reads in part:

> IT IS ORDERED that the respondent Sidney J. Mueller, an individual trading as Mueller Hair Experts or under any other name, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale or sale of treatments of the hair and scalp in which the various costmetic and other preparations, as set out in the findings herein, are used; or in connection with the sale, offering for sale or distribution of the various cosmetic and other preparations as set out in the findings herein, for use in the treatment of conditions of the hair and scalp or of any other preparations of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from:
>
> I. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:
>
> (a) That the use of said preparations by purchasers in their homes, or that treatments of the hair or scalp by respondent or his operators in which the various cosmetic and other preparations set forth in the findings are used, or in which any other preparations of substantially similar composition or possessing substantially similar properties are used, will:
>
> (1) Have any effect in preventing or overcoming baldness.
>
> (2) Cause hair to grow thicker in spots where it is thin.
>
> (3) Cause "fuzz" to be replaced by normal hair.
>
> (4) Cause the hair growing functions of the scalp to be rejuvenated.

(Continued)

At the time the order was issued Mueller had offices in six states and shipped considerable merchandise (cosmetics and home treatment kits) across state lines. Mueller consented to the order and after its issuance closed all of the offices not located in Texas.[4] In Texas he continued to maintain offices in Houston, Dallas, Fort Worth, and San Antonio. His method of doing business, however, was substantially the same as it was before the cease and desist order: Mueller Hair Experts sold scalp and hair preparations directly to the consumer for home use and also gave treatments at the office, the "trichologists" using the same preparations sold for home use.

After the cease and desist order, Mueller advertised only in Texas papers. Sixteen advertisements are in the

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[3] (Continued)

(5) Kill bacteria beneath the scalp,

(6) Cause the scalp to be energized to grow new hair,

(7) Cause the permanent elimination of dandruff, itching, dryness or oilness of the scalp.

(8) Cure all scalp disorders, keep the hair healthy or enable an individual to maintain a thick head of hair;

(b) That respondent's preparations are dissimilar to preparations used by competitors;

(c) That respondent's preparations are the result of discoveries made during the last war, or discoveries of recent years.

II. Disseminating or causing to be disseminated by any means, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in subparagraphs (a) through (c) of Paragraph I hereof or which represents, directly or by implication, that respondent or any of his employees who have not had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair are trichologists, or hair scientists, or that respondent has, or has had, experts in chemistry in his employ."

[4] In 1953, after the cease and desist order was entered, Mueller's attorney met with the attorney for the Fedral Trade Commission to advise him that Mueller was no longer engaged in interstate commerce; and, citing cases, that mere crossing of state lines by newspapers did not put the advertiser in interstate commerce.

record. These are engaging: "It's never too late to save your hair"; "There but for Mueller go I"; "After worrying about baldness for 5,354 years, man learns to MAKE HAIR GROW"; "Save Your Hair Week Starts Tomorrow". Five of the advertisements referred to special home treatments for people who live out-of-town or travel. Mueller mailed no newspapers and shipped no cosmetics out of Texas. The publishers circulated their newspapers outside of Texas in part through the United States mails.

The facts were stipulated. The District court found that the advertisements in the record violated the Commission's cease and desist order and rendered judgment for the United States in the amount of $8000. We agree with the district court.

I.

Mueller contends that *he* did not disseminate the advertisements; the newspaper publishers did. Mueller contends that the government stipulated itself out of court in agreeing that "Defendant did not buy, sell, or ship the various cosmetics or other preparations in question, or *anything else* outside the state" and that the "newspapers were distributed by said publishers of said newspapers through the United States mail and to points outside the State of Texas". "Anything else", Mueller argues, includes newspapers.

The weakness in this argument is the assumption that the Federal Trade Commission Act and order are applicable only if the false advertising is disseminated by the defendant himself. The cease and desist order, however, applies to the defendant "causing [the advertisements] to be disseminated". This language tracks the Act. Section 12(a) of the Act, 15 USCA 52(a), provides:

"It shall be unlawful for any person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics. * * * "

Shafe v. Federal Trade Commission, 6 Cir., 1958, 256 F. 2d 661, concerned false advertisements of O-Jib-Wa Bitters, a wondrous cure for a variety of ailments. Shafe claimed that in advertising in Michigan papers only and in restricting their sales to the state of Michigan, he was not subject to regulation by the Federal Trade Commission, which has no authority over purely intrastate transactions. *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, 61 S. Ct. 580, 85 L. Ed. 881. Compare: *Chas. A. Brewer & Sons v. Federal Trade Commission*, 6 Cir., 158 F. 2d 74, 79. He argued that only a small percentage of the newspapers carrying their advertisements went into states other than Michigan and, in any event, such interstate delivery was the act of the newspapers and not the act of the petitioners. In *Shafe v. FTC*, 6 Cir., 1956, 256 F. 2d 661 it was held:

"Nor is it necessary that the false advertising be directly disseminated by the respondents. The statute makes it unlawful for the respondents to cause such false advertising to be disseminated. Under these plain, unambiguous provisions of the statute, petitioners' contentions that they made no sale in interstate commerce and that they did not personally disseminate any false advertisement do not constitute a defense to the action."

We agree with this decision. Here it is immaterial that Mueller, himself, did not buy, sell or ship "any-

thing" out of Texas. It is immaterial that the stipulation recited that Texas publishers circulated their newspapers in other states. Mueller was responsible for the advertisements being placed in the newspapers. That caused, resulted in, the advertisements being disseminated by United States mails.

The term "cause" is in the statute without any qualification relating to the advertiser's state of mind. It is unimportant therefore whether Mueller thought that he was not violating the cease and desist order and did not intend to come under federal jurisdiction.[5] The statute holds him liable for the natural consequence of his act regardless of his intentions. A contrary construction would blow the Act apart.

II.

Mueller's second contention is that under the cease and desist order and Section 12 of the Federal Trade Commission Act (15 USCA 52) there is no federal jurisdiction since his advertisements applied only to intrastate sales and treatments. He contends that for federal jurisdiction to attach, the advertisements must induce the purchase of goods in interstate commerce.

The cease and desist order in this case consists of two paragraphs.[6] Paragraph I prohibits defendant from disseminating false advertisements "by means of the United States mails" or in interstate commerce. Paragraph II prohibits the dissemination of the advertisements "*by any* means * * * for the purpose of inducing,

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[5] Mueller was not so naive as to think that Houston, Dallas, Fort Worth, and San Antonio papers are not circulated in appreciable numbers outside of those cities. One of the advertisements in the Houston Chronicle was headed, "Special Home Treatment for Out-of-Town Clients".

[6] See Footnote 2.

or which is likely to induce, directly or indirectly, the purchase" of Mueller's cosmetics in interstate commerce. Thus, under the first paragraph there is no necessity of an intent or likelihood of inducing interstate sales; under the second paragraph, such sales must be intended or likely.

This order is based directly on Section 12(a) of the Federal Trade Commission Act.[7] This section reads:

> "Sec. 12(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisements—
>
> (1) By United States mails, or in commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing on which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics."

Construing Section 12(a) in *Shafe v. Federal Trade Commission*, 6 Cir., 1958, 256 F. 2d 661, 663, 664, the Court held:

> "Under this section it is not necessary that there be a sale in interstate commerce. It is the dissemination of false advertising that the statute is directed against. The use of advertising is well

[7] Section 12(a) was added to the Federal Trade Commission Act in 1938. In holding the section constitutional, the Court held in American Medicinal Products, Inc. v. Federal Trade Commission, 9 Cir., 1943, 136 F. 2d 426, 427: "The constitutional question attempted to be raised is lacking in substance. Petitioners have no constitutional right to disseminate false advertisements by the United States mails or by any means in commerce or by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of their preparation in commerce. That Congress had power to prohibit such dissemination cannot be doubted."

> recognied as an integral part of the production and distribution of goods, and as such is subject to the regulatory powers of the Commission. * * * In addition, it will be noticed that Section 12(a) of the Act makes it unlawful to cause the dissemination of false advertisements by the United States mails irrespective of whether such dissemination is or is not in interstate commerce. It is settled law that congressional control of the mails, under the power conferred by the Constitution, includes the power to forbid the use of the mails for deceptive transactions which are detrimental to the financial well-being of the nation."

Federal jurisdiction attached because Mueller used the United States mails and also caused his false advertisements to be disseminated across state lines, for the purpose of inducing purchases in commerce. That was the offense Congress described in Section 12(a)(1). The offense does not depend on inducing purchases in interstate commerce.

III.

Mueller's last stand is that he advertised treatments, not products; that the Act applies to products, not treatments.

When a man indulges in a shave in a barber shop he is buying a service (the barber's skill and time); not shaving cream and shaving lotion.[8] We buy shoe shines not shoe polish. On the other hand, we purchase material

[8] "A sale is complete when the drug is delivered whether hypodermically into the human system by the request of the buyer, or deliverd elsewhere on his direction and does not need to be personally handled by the buyer." Ratigan v. United States, 9 Cir., 1937, 88 F. 2d 919, 922. In Western Leather Company v. State Tax Commission of Utah, 48 P 2d 526, repairing of shoes was also a sale of leather. In Swain, Nelson & Sons Co. v. Department of Finance, 6 N.E. 2d 632 (1937), landscaping was a sale of trees and shrubs. In Wilson v. Glander, 86 N.E. 761, 763, recapping of tires was a sale of rubber.

as well as tailoring when we buy a tailored suit. Here, however, we do not have to draw any fine distinction between the sale of a service and the sale of a product along with a service. In this case the advertisements show that Mueller represented that the chief thing he had to offer was the miraculous effect produced by his cosmetic preparations. The sale of the office treatment was a transaction where an appreciable part of the consideration for the service was a payment for the material. In addition, Mueller sold directly to customers his cosmetics and home treatment kits. On this point, the stipulation leaves very little for the defendant to argue about. It provides:

> "PARAGRAPH TWO: In the course and conduct of his business, the respondent [appellant] for several years last past has been engaged in the sale and distribution of various cosmetic and other preparations for external use in the treatment of conditions of the hair and scalp, including sales of such preparations through use of them in connection with treatments administered in his various offices."

Balding customers attracted to Mueller's Hair Experts had two choices. They could take treatments at his office, in the course of which Mueller's preparations would be aplied—Or they could buy the same preparations and give themselves treatments—We think that for purposes of the Act there is no differences between the two choices, in the misrepresentation or in the purchases of the misrepresented product. Congress prohibited both choices, when offered in advertising disseminated in the United States mails or crossing state lines.

Judgment is

AFFIRMED.

APPENDIX "B"

Title 15, United States Code, Section 52

(Federal Trade Commission Act)

Section 52. Dissemination of false advertisements—Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisements—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of the section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title.

APPENDIX "B"

Title 15, United States Code, Section 54(a):
(Federal Trade Commission Act)

Section 54. Same; penalties—Imposition of penalties

(a) Any person, partnership, or corporation who violates any provision of Section 52(a) of this title shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation for any violation of such section, punishment shall be by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

APPENDIX "B"

Louisiana False Advertisement Statute

Louisiana Revised Statutes, Title 51, Section 411

Advertisements, untrue or misleading, prohibited; penalty.

No person, with intent to sell or in any way dispose of merchandise, securities, service, or anything directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title, or an interest therein, shall make, publish, disseminate, circulate, or place before the public, or cause directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, hand-bill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Whoever violates this Section shall be fined not less than twenty five dollars nor more than five hundred dollars, or imprisoned for not less than ten days nor more than six months, or both for each offense.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 481

LEO O. JOHNSON, DOING BUSINESS AS JOHNSON HAIR AND SCALP CLINIC, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13) is reported at 266 F. 2d 560. The opinion and order of the Federal Trade Commission (R. 70–79) have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1959, following denial on July 21, 1959, of a petition for rehearing (Pet. 14–15). The petition for a writ of certiorari was filed on October 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Commission held that petitioner, by advertising his preparations for the prevention and cure of baldness in newspapers which are circulated in substantial numbers by the United States mail and in commerce by other means, caused the dissemination of false advertisements in violation of Section 12(a)(1) of the Federal Trade Commission Act. The questions presented are:

1. Whether Congress authorized the Federal Trade Commission to control the interstate advertising of a local business making no out-of-state sales, and had power to do so under the commierce clause of the Constitution.

2. Whether the placement of false advertisements in newspapers having a substantial out-of-state and mail circulation "cause[d]" the dissemination of such advertisements.

STATUTE INVOLVED

The applicable provisions of the Federal Trade Commission Act (38 Stat. 717, as amended, 52 Stat. 111, 15 U.S.C. 41) are as follows:

> SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mail, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly

or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

* * * * *

STATEMENT

The petitioner is engaged in the business of selling various cosmetics of his own preparation designed for external use in the prevention of baldness, the growing of hair, and the elimination of various scalp disorders. By extensive advertising in leading New Orleans newspapers, petitioner invites the public, including "[o]ut-of-town clients" (R. 19), to come to his clinic and either purchase a series of treatments or to purchase the preparations for home use. A substantial number of these newspapers are distributed through the United States mail and in interstate commerce by various means (R. 57, 74–75). There was no evidence, however, that petitioner ever sold any of his products to out-of-state clients or shipped his preparations across state lines.

The finding by the Hearing Examiner (R. 59–63), affirmed by the Commission (R. 75), that petitioner's advertisements were false and misleading in material respects is not contested. Petitioner is not an authority on the hair or scalp, and his preparations will have no beneficial effect in overcoming or preventing male-pattern baldness, which accounts for 95% or more of all cases of baldness.

The Commission concluded that petitioner's insertion of his false advertising in the New Orleans papers "cause[d]" the dissemination of such advertising "by United States mail, or in commerce" within the meaning of Section 12(a)(1) of the Act

(R. 76–79) and ordered petitioner to discontinue disseminating or causing to be disseminated by the United States mail or by any means in commerce these false and deceptive advertisements (R. 70–73). The court of appeals (Judge Cameron dissenting) affirmed *per curiam*, on the authority of its decision in *Mueller* v. *United States*, 262 F. 2d 443 (C.A. 5).

ARGUMENT

1. Petitioner urges that Congress, in adopting Section 12(a)(1) of the Federal Trade Commission Act in 1938, did not purport to cover false advertisements by a local "one-shop" business in local newspapers having an interstate circulation, and that if Congress so intended it was an unconstitutional exercise of the commerce power. It is clear, however, from the plain and unambiguous language of Section 12(a)(1) that Congress intended to forbid the use of the mails or other media of commerce for spreading false advertising regardless of whether the advertiser's business was itself in commerce (a matter covered by Section 12(a)(2)). *Shafe* v. *Federal Trade Commission*, 256 F. 2d 661 (C.A. 6); *Mueller* v. *United States*, *supra*. In adopting these provisions as part of the 1938 Wheeler-Lea amendments to the Act, 52 Stat. 114, Congress made clear that these "far reaching" provisions relating to false advertising were "entirely warranted, necessary for the effective control of illegitimate advertising" (H. Rep. 1613, 75th Cong., 1st Sess., p. 4). And the constitutional power of the Congress to reach such practices can no longer be disputed. See *United States* v. *Darby*, 312 U.S. 100;

Cloverleaf Co. v. *Patterson*, 315 U.S. 148; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572; *Wickard* v. *Filburn*, 317 U.S. 111.

2. Petitioner also contends that the newspaper publishers, not the petitioner, "cause[d]" the dissemination of the false advertisements, within the meaning of Section 12(a)(1), by their independent selection of interstate means of circulation. It is immaterial, for purposes of this provision that petitioner did not directly disseminate the false advertising. Petitioner was undeniably responsible for the advertisements being placed in newspapers of general circulation. Thus, his voluntary action "caused, resulted in, the advertisements being disseminated * * *." *Mueller* v. *United States*, 262 F. 2d 443, 446 (C.A. 5). And see *Shafe* v. *Federal Trade Commission*, 256 F. 2d 661, 664 (C.A. 6).

Nor is the question whether the record here would provide sufficient proof of knowledge or intent to warrant criminal prosecution under Section 14(a) of the Act relevant to the determination whether petitioner's actions justified issuance of a prospective, remedial cease-and-desist order under Section 5. Such an order is but a "prophylactic" or "preventive measure taken in the interest of the general public." *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 432, 435 (dissenting opinion of Mr. Justice Brandeis).

CONCLUSION

The case presents no question warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
DONALD L. HARDISON,
Attorneys.

DANIEL J. MCCAULEY, JR.,
General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission.

NOVEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959